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Selling your story—literary proceeds orders under the Commonwealth *Proceeds of Crime Act 2002*

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Contents

Introduction	1
Proceeds of Crime—restraint and confiscation	1
Literary proceeds orders.	1
Unknown territory.	4
Schapelle Corby	4
David Hicks	5
Conclusions	8

Introduction

The Commonwealth's *Proceeds of Crime Act 2002* (the Act) commenced on 1 January 2003. The Act provides a scheme to trace, restrain and confiscate the proceeds of certain classes of crime against Commonwealth law. In some circumstances it can also be used to confiscate the proceeds of crime against foreign law or the proceeds of crime against state law (if those proceeds have been used in a way that contravenes Commonwealth law). Importantly, confiscation does not always require that a person has been actually convicted of a crime.

Recently, there has been significant interest in the provisions of the Act that allow for the confiscation of profits made by a person for selling, publishing or otherwise telling his or her story. Interest in the cases of Mark 'Chopper' Reid, Schapelle Corby and David Hicks has raised questions about the applicability of the existing proceeds of crime laws (including state and territory laws) to people who have profited, or may profit in the future, from their criminal notoriety through book, magazine, film or television deals.¹

This Background Note explores the provisions that allow for the confiscation of profits that are obtained from a person's sale or publication of his or her story.

Proceeds of Crime—restraint and confiscation

The *Proceeds of Crime Act 1987* provided for the confiscation of profits obtained by crimes such as drug trafficking prior to the enactment of the Act in 2003.² The more recent Act has expanded the confiscation regime to include non-conviction based confiscation and now covers conduct such as money laundering and terrorism activity.³ One of the new confiscation mechanisms in the Act is the literary proceeds order.

Literary proceeds orders

A literary proceeds order is the mechanism in the Act which allows a court to order payments to the Commonwealth of any proceeds that a person has derived in relation to an indictable

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1. See: *Confiscation of Proceeds of Crime Act 1989* (NSW), *Confiscation Act 1997* (Vic), *Criminal Proceeds Confiscation Act 2002* (Qld), *Criminal Assets Confiscation Act 2005* (SA), *Criminal Property Confiscation Act 2000* (WA), *Crime (Confiscation of Profits) Act 1993* (TAS), *Criminal Property Forfeiture Act 2002* (NT), *Confiscation of Criminal Assets Act 2003* (ACT).
 2. The *Proceeds of Crime Act 1987* (Cwlth) is still in effect. There are a number of outstanding cases which commenced prior to the enactment of the later Act.
 3. For further information on the *Proceeds of Crime Act 2002* (Cwlth), see:
<http://www.aph.gov.au/library/pubs/bd/2001-02/02bd180.htm>. The Act is available at:
[http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/71E8C4723CE31243CA257323000779B9/\\$file/ProceedsCrime2002_WD02.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/71E8C4723CE31243CA257323000779B9/$file/ProceedsCrime2002_WD02.pdf) accessed on 13 March 2008.

offence.⁴ There is no requirement that a person has been convicted of an offence, but the court hearing the application for the order must be satisfied on the balance of probabilities that the person has committed an offence.⁵ It is a question for the court to decide whether to confiscate such profits - it is not automatic.

Literary proceeds are defined as any benefit that a person derives from the commercial exploitation of the person's notoriety resulting, directly or indirectly, from the person committing an indictable offence or a foreign indictable offence.⁶ The commercial exploitation may be by any means. This includes publishing any material in written or electronic form, or any use of media from which visual images, words or sounds can be produced, or any live entertainment, representation or interview.⁷

If the offence is an indictable offence, it does not matter whether the benefits are derived within or outside Australia.⁸ It is therefore conceivable that an Australian could derive a benefit from a publication in America, even if those benefits are retained in America. As Justice Keane of the Supreme Court of Queensland recently noted, 'the Act is not concerned with where the commercial exploitation which has produced the benefit has occurred'.⁹ However, this principle does not apply in relation to a foreign indictable offence where any benefit is not treated as literary proceeds unless the benefit is derived in Australia or transferred to Australia.

The Australian Federal Police are responsible for investigating whether or not a person has obtained literary benefits. If there is sufficient evidence to indicate that the literary proceeds provisions in the Act could capture a person's profits, the matter will be referred to the Commonwealth Director of Public Prosecutions. An application by the Commonwealth Director of Public Prosecutions is then made for restraining orders over the profits and then a literary proceeds order. The literary proceeds order will require that payments, based on the literary proceeds that a person has derived, are made to the Commonwealth.

What does a court have to consider when making a literary proceeds order?

Paragraph 154(a) of the Act outlines the factors that a court must consider when making a literary proceeds order. These factors are:

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4. In the federal jurisdiction an indictable offence includes any offence punishable by more than 12 months imprisonment: section 4G *Crimes Act 1914* (Cwlth).
 5. Section 152 of the Act.
 6. Defined in section 337A of the *Proceeds of Crime Act 2002* (Cwlth).
 7. Section 153(1) and (2) of the *Proceeds of Crime Act 2002* (Cwlth).
 8. Section 153(3) of the *Proceeds of Crime Act 2002* (Cwlth).
 9. *Director of Public Prosecutions (Cwlth) v Corby* [2007] QCA 58 (2 March 2007) at 14.

- (i) the nature and purpose of the product or activity from which the literary proceeds were derived; and
- (ii) whether supplying the product or carrying out the activity was in the public interest; and
- (iii) the social, cultural or educational value of the product or activity; and
- (iv) the seriousness of the offence to which the product or activity relates; and
- (v) how long ago the offence was committed.

The court may also take into account such other matters as it thinks fit.¹⁰

The explanatory memorandum to the Act does not shed any light on why these particular factors were chosen and what circumstances they might be envisaged to cover. Notably, what constitutes ‘in the public interest’ (subparagraph 154(a)(ii)), is ambiguous. As academics Simon Bronitt and Bernadette McSherry note:

The difficulty with using concepts like public interest is that it is neither neutral nor autonomous. It is highly contingent upon historical, political and social contexts.¹¹

What about if a family member or third party, including a charity, profits from the sale?

In determining whether a person has derived literary proceeds, or the value of those literary proceeds, the court may treat as property of the person any property that is subject to the person’s effective control.¹² Property might also include that which was not received by the person, but was transferred to, or (in the case of money) paid to, another person at the person’s direction.¹³ This would cover circumstances where a parent may receive money for selling a story about their child’s notoriety and the money is paid to the child, or into a trust for that child’s benefit.

10. Paragraph 154(b) of the *Proceeds of Crime Act 2002* (Cwlth).

11. S. Bronitt, and B. McSherry, *Principles of criminal law*, 2nd edition, Thomson Lawbook Co, 2005, p. 60.

12. Effective control is defined as including where the person has a legal or equitable estate or interest in the property; or a right, power or privilege in connection with the property. Property that is held on trust for the ultimate benefit of a person is also taken to be under the effective control of the person. See section 337 of the *Proceeds of Crime Act 2002* (Cwlth) for further detail.

13. Section 153(4) of the *Proceeds of Crime Act 2002* (Cwlth).

Charities

If a person sells his or her story and offers a portion, or all of the profits from that sale to a charity, those profits could be restrained and confiscated. While the court would assess this on a case-by-case basis, a charity would likely be considered a recipient of property that was under the person's effective control.

Unknown territory

The Australian literary proceeds orders provisions have not yet been used by a court and overseas jurisdictions offer little insight in this area. In the United Kingdom there has been no legislation specifically targeting literary proceeds. However, there are legislative provisions to allow for confiscation of the proceeds of crime.¹⁴ The United States has provisions for confiscating the profits that criminals have gained from their notoriety.¹⁵ The laws of the United States are different from the Australian laws in that they require a person to be convicted of the offence before confiscation can occur.

While Australian States and Territories have proceeds of crime legislation, some with specific provision for literary proceeds orders, no confiscation of literary proceeds has yet been ordered by a court.¹⁶ Without a precedent, one can only speculate how a court might exercise its discretion in making a literary proceeds order.

Schapelle Corby

Schapelle Corby was found guilty in Indonesia in August 2005 of drug smuggling and is presently serving a 20 year prison sentence in Kerobokan prison in Bali.¹⁷ In November

14. C. Munro, 'When criminals sell their stories', *Public Law* Spring 2006, 58–83, p. 59.

15. K. Howe, 'Is free speech too high a price to pay for crime?', *Loyola of Los Angeles Entertainment Law Review*, 24(2), 2004, p. 342.

The laws in the United States are commonly called 'Son of Sam' laws. As of 2002, over forty states and the federal government had enacted they types of laws. For example, the Californian Civil Code allows for the confiscation of 'all proceeds from the preparation for the purpose of sale, the sale of the rights to, or the sale of materials that include or are based on the story of a felony for which a felon was convicted'.

16. Some Australian states and territories have similar confiscation of literary profits provisions. For example, see section 81 *Confiscation of Criminal Assets Act 2003* (ACT), section 71 *Criminal Property Forfeiture Act* (NT), section 200 *Criminal Confiscation Act 2002* (Qld), section 111 of *Criminal Assets Confiscation Act 2005* (SA).

17. Drug smuggling is considered a foreign indictable offence under section 337A of the *Proceeds of Crime Act 2002* (Cwlth). The definition requires that the relevant conduct that constitutes an offence against a law of a foreign country has occurred at a time when if the conduct had occurred in Australia the conduct would have constituted an offence against a law of the Commonwealth, a state or a territory punishable by at least 12 months imprisonment.

2006, the book *My Story* was published in Australia by Pan Macmillan Australia. The book was

co-authored by Corby and former television producer Kathryn Bonella. Pacific Magazines Pty Ltd separately published a *New Idea* article relating to Corby's experiences in late 2006.

Investigations by the Australian Federal Police revealed that, under the contract relating to *My Story*, payments totalling \$267 750 had been made by Pan Macmillan publishers to an Indonesian account held in the name of Corby's brother-in-law. Further payments were still to be made depending on sales. A separate sum of \$15 000 was to be paid to the same bank account in relation to the *New Idea* article.

In this case, because the funds appear to be in an Indonesian bank account, Australian authorities would seek the cooperation of the Indonesian authorities to successfully forfeit the payments. This would be done under the provisions of the Commonwealth's *Mutual Assistance in Criminal Matters Act 1987*.

On 2 March 2007, the Supreme Court of Queensland made an order pursuant to section 20 of the Proceeds of Crime Act restraining, or 'freezing' certain items of property, including future payments in respect to *My Story*.¹⁸ The Commonwealth Director of Public Prosecutions has now filed an application for a literary proceeds order against Schapelle Corby under section 152 of the Act. At the time of this publication no date has been fixed for the hearing of the application.

It is important to note that both the making of a literary proceeds order in this matter, and the amount which Corby may be ordered to pay, are at the discretion of the court, having regard to factors specified in the Act (as noted above).

David Hicks¹⁹

In March 2007, David Hicks pleaded guilty in a United States Military Commission to the offence of providing material support to terrorism. He was convicted and sentenced to seven years imprisonment, which he mostly served in Guantanamo Bay. However, under a pre-trial agreement with United States authorities, six years and three months of the sentence were suspended, and a transfer agreement allowed Hicks to serve out the remaining nine months of the sentence in Adelaide's Yatala Prison, from which he was released on 29 December 2007.²⁰ As part of the pre-trial agreement, a 'gag' order was placed on Mr Hicks, prohibiting from telling his story until the end of March 2008.

18. Director of Public Prosecutions (*Cwlth*) v *Corby* [2007] QCA 58 (2 March 2007).

19. The following discussion is based on the hypothetical situation that Hicks sells or otherwise publishes his story.

20. United States Department of Defense, 'Detainee Convicted of Terrorism Charge at Guantanamo Trial', *NewsRelease*, 30 March 2007, at:

Pre-trial agreement

Under the pre-trial agreement, Hicks has agreed to assign to the Australian Government any profits or proceeds which he may be entitled to receive in connection with any publication or dissemination of information relating to the illegal conduct for which he has been convicted.²¹ This agreement was made between Hicks and the United States' Government and failure to abide by its terms and conditions (including the assignment mentioned above) could result in the United States' authorities asking the Australian Government to return Hicks to the United States to serve the full term of his sentence. However, this would be a complicated legal and political process. Given the political and legal uncertainties of what would occur if the United States' Government demanded his return if he breached the pre-trial agreement, this paper will only focus on the relevant issues of Australian law. It does not take account of the enforceability of the pre-trial agreement.

Does the Military Commission fall within the meaning of that defined in the Proceeds of Crime Act 2002?

Under section 20 of the Proceeds of Crime Act, the court only needs to be satisfied that there are reasonable grounds to suspect that a person has committed a foreign indictable offence. While a conviction is not necessary, the court would first need to be satisfied that Hicks' circumstances fall within the scope of the definition of 'foreign indictable offence' under the Act. Only then could an application be made to confiscate the profits of any publication.

Legislation was passed in 2004 that specifically amended the definition of foreign indictable offence.²² The key element of that amendment was:

[An] offence against a law of a foreign country *includes* an offence triable by a Military Commission of the United States of America established under a Military Order of 13 November 2001 made by the President of the United States of America and entitled "Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism" [emphasis added]

This was added with the intention to cover the offences with which David Hicks was charged. The amendment makes specific reference to the 2001 Military Commission which was later found to be invalid, and not the later Commission before which Hicks was convicted.²³

<http://www.defenselink.mil/releases/release.aspx?releaseid=10678>, accessed 21 February 2008.

21. Paragraph 2d, text of *United States v David Matthew Hicks*, Offer for a Pretrial Agreement, 26 March 2007, published in *The Australian*, G. Elliott 'How Mori got Hicks a deal', April 2, 2007: <http://www.theaustralian.news.com.au/story/0,20876,21486066-17281,00.html>, accessed 18 March 2008.
22. Section 26, *Anti-terrorism Act 2004* (Cwlth).
23. *Hamdan v Rumsfeld*, *Secretary of Defense* (No. 05-184), 415 F. 3d 33, 29 June 2006, (United States Supreme Court). The Supreme Court found that the Military Commission established by Presidential Order of 13 November 2001 failed to satisfy the requirements for a fair trial

However, because the definition above uses the term ‘includes’ (and therefore is not exhaustive), Hicks’ conviction would probably fall within the above definition.²⁴

Notwithstanding Hicks was convicted by the United States Military Commission, would a court be satisfied he actually committed the relevant foreign offence?

While the defence team and Hicks seem to accept the conviction and the guilty plea, it is arguable that the circumstances under which Hicks was tried and convicted make it difficult to confirm the due-process ‘legitimacy’ of the conviction. One commentator has noted that a ‘trial conducted before a Military Commission established under the Military Commission Act 2006 would contravene the standards for a fair trial’.²⁵ Australian courts will, in principle, recognise the judgments of foreign jurisdictions.²⁶ However, if the legitimacy of the conviction was challenged before an Australian court, that court would not be obliged to recognise a foreign country’s judicial decisions.²⁷

South Australian legislation

In 2007, the South Australian Government passed legislation to cover the circumstances of Hicks selling his story.²⁸ According to media reports, this is because the South Australian Government sought to remove any doubt that Hicks might legitimately retain the profits from the sale of his story.²⁹ The amendments to the *Criminal Assets Confiscation Act 2005* (SA)

prescribed by Common Article 3(1)(d) of the Geneva Conventions, namely that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him.

24. This would be a consistent application of section 15AD of the *Acts Interpretation Act 1901* (Cwlth): which states that where an Act includes an example of the operation of a provision the example shall not be taken to be exhaustive.
25. P. Vickery and A. Nicholson, ‘David Hicks, *Military Commissions Act 2006* – Compliance with Common Article 3 of the Geneva Conventions, the *Hamdan* Decision and Australian Law’, 9 November 2006, p. 27. <http://www.ahrcentre.org/content/Activites/news.html>, accessed 11 March 2008. See also the July 2007 Final report: *US v David Hicks* by Lex Lasry QC at <http://www.lawcouncil.asn.au/hicksjustice.html>, accessed 13 March 2008.
26. *Goddard v Gray* (1870) LR 6 QB 139 at 150 per Blackburn J, quoted in Halsbury’s *Laws of Australia*, 85, Conflict of Laws.
27. *U v U* [2002] HCA 36; 211 CLR 238; 191 ALR 289; 76 ALJR 1416 (5 September 2002) at 148 per Kirby J.
28. http://parlinfoweb.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=pressclp&Criteria=CITATION_ID:396P6%3B
29. *The Australian*, ‘Canberra’s Pulp Friction: New Fight Against Hicks’, 4 May 2007, p. 23. *The Sydney Morning Herald*, ‘Ban on Hicks Story’, 7 December 2007, p. 4.

provide for the recognition of the renewed Military Commission that was established following the invalidation of the 2001 Military Commission.³⁰

However, it has been noted that ‘unless the proposed South Australian legislation was replicated in every state and territory, it would easily be bypassed.’³¹ The legislation could be bypassed by Hicks selling or otherwise publishing his story in another state or territory, including New South Wales, where Hicks is presently living.³²

Conclusions

To date, there have not been any literary proceeds orders made by a court and the provisions of the Act are surrounded by a number of issues and questions – however the first indication of the courts’ application of the literary proceeds provisions will be in the forthcoming Corby case.

In the case of David Hicks, there has not yet been any publication or sale of a story that could be captured by the provisions. It is important to note that the Proceeds of Crime Act will not prevent Hicks from telling his story, but could be used to potentially confiscate any profits he makes as a result of the sale of that story. Should Hicks sell his story, it would be a matter for the Australian Federal Police to investigate whether he has profited from the commercial exploitation of his criminal notoriety and the Commonwealth Director of Public Prosecutions to seek a literary proceeds order. Ultimately, it would be a decision of the courts to grant such an order.

30. Sections 3 and 10 of the *Criminal Assets Confiscation Act 2005* were amended to cover foreign offences which are declared to be foreign offences by regulation. The Regulations were then amended to include the United States Military Commission constituted under Title 10 USC Sec 948d of the *Military Commissions Act 2006* of the United States of America. The Commonwealth has not made any similar amendments to the *Proceeds of Crime Act 2002* (Cwlth).

31. Sydney University Law Dean Ron McCallum, quoted in Merritt, C ‘Canberra’s pulp friction: new fight against Hicks’, *The Australian*, 4 May 2007 at p. 23.

32. ‘Hicks Sydney Sojourn Revealed’, *The Daily Telegraph*, 6 March 2008. *The Daily Telegraph* reports that the Australian Federal Police had permitted Hicks to be in Sydney. Hicks is still subject to a court-enforced control order requiring him to report twice a week to police and to observe a 1am to 5am curfew.

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